

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



75-1042

To be argued by  
JAMES E. NESLAND

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**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 75-1042**

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*—against—*

JOSE KENNETH PENARANDA,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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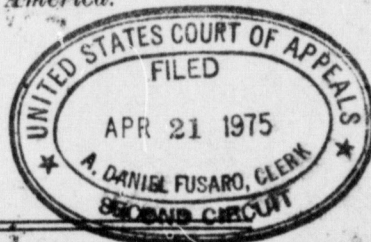
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## TABLE OF CONTENTS

	PAGE
Preliminary Statement .....	1
The <i>Toscanino</i> Hearing .....	2
(A) Penaranda's Testimony .....	2
(B) The Government's Evidence .....	3
ARGUMENT:	
The trial court properly refused to divest itself of jurisdiction over Penaranda .....	5
CONCLUSION .....	8

### TABLE OF CASES

<i>Banco Nacional de Cuba v. Sabbatino</i> , 376 U.S. 398 (1964) .....	5
<i>Oetjen v. Central Leather Co.</i> , 246 U.S. 297 (1918) ....	5
<i>Ricand v. American Metal Co.</i> , 246 U.S. 304 (1918) ....	5
<i>Underhill v. Hernandez</i> , 168 U.S. 250 (1897) .....	5
<i>United States v. Lira</i> , Dkt. No. 74-2567 (2d Cir. April 14, 1975) .....	5, 7
<i>United States ex rel. Lujan v. Gengler</i> , 510 F.2d 62 (2d Cir. 1975) .....	5, 6
<i>United States v. Sobell</i> , 244 F.2d 520 (2d Cir.), <i>cert.</i> <i>denied</i> , 355 U.S. 873 (1957) .....	5
<i>United States v. Toscanino</i> , 500 F.2d 257 (2d Cir. 1974) ..	5



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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

Jose Kenneth Penaranda appeals from a judgment of conviction entered on January 23, 1975 in the United States District Court for the Southern District of New York, after having pleaded guilty before the Honorable Charles E. Stewart, Jr., United States District Judge.

Indictment 73 Cr. 751, filed on August 3, 1973, charged defendant Penaranda and sixteen other defendants with conspiracy to violate former Sections 173 and 174 of Title 21, United States Code, and Sections 812, 841(a)(1), 841(b)(1)(A), 951(a)(1) and 952 of Title 21, United States Code, by importing from various South American countries and distributing within the United States more than 225 kilograms of cocaine. Penaranda pled guilty to conspiring to violate Sections 812, 841(a)(1), 841(b)(1)(A), 951(a)(1)

and 952 and was sentenced to a term of imprisonment of two years with a special parole term of three years to follow.\*

### **The Toscanino Hearing**

Prior to Penaranda entering a guilty plea, on November 21, 1974 Judge Stewart held a hearing pursuant to *Toscanino* concerning Penaranda's allegations that he had been illegally abducted from Bolivia by the United States Government. To prove the allegations, the defense presented the testimony of Penaranda.

The Government called as its witness Marcelino Bedolla, Special Agent in charge of the United States Drug Enforcement Administration Office in La Paz, Bolivia, and also submitted an affidavit from Roger C. Brewin, Deputy Chief of Mission, American Embassy, La Paz, Bolivia.

#### **(A) Penaranda's Testimony.**

Penaranda testified that on May 4, 1974 he was met at his mother's house by two Bolivian agents, who asked Penaranda to accompany them to a police station in San Pedro, a section of La Paz. At the police station, additional Bolivian agents joined them and Penaranda was informed he was under arrest. Penaranda testified that he was then tied, given dark glasses to wear, covered with a blanket and raincoat, and driven to some place outside La Paz by the several Bolivian agents.

After reaching an unknown destination, Penaranda testified that he was taken into a room where he was hit by the

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\* At the time he entered his guilty plea, Penaranda, pursuant to stipulation, preserved his right of appeal respecting his claim under *United States v. Toscanino*, 500 F.2d 257 (2d Cir. 1974) that the Government had acted improperly in obtaining jurisdiction over him.

Bolivian agents until he lost consciousness. Penaranda testified that he was kept handcuffed and blindfolded in that room, and intermittently beaten, until one night he was taken out and driven to another vehicle, which then transported him to the La Paz airport.

At the airport his blindfold and blanket were removed and he observed a Bolivian agent and an American agent with him in the vehicle, and numerous Bolivian agents with guns surrounding the vehicle. He was then placed aboard Braniff Airlines plane and flown to New York in the company of the American and Bolivian agents.

#### **(B) The Government's Evidence.**

Special Agent Bedolla testified that in late 1973, having been notified of Penaranda's indictment in the Southern District of New York, he met with William Stedman, the American Ambassador to Bolivia, and Roger Brewin, Deputy Chief of Mission, to discuss the possibility of their officially requesting the Bolivian government to expel Penaranda on the basis of the indictment in the United States for smuggling narcotics.\* (Tr. 17-18). A decision was made to approach the Bolivian Minister of Interior and, on January 30, 1974, Mr. Brewin met with Walter Castro, the Minister of Interior of Bolivia. The Minister informed Mr. Brewin that his government would turn over Penaranda to the United States for prosecution, if presented with certified, translated copies of the outstanding indictment and arrest warrant naming Penaranda. (Affidavit of Roger Brewin, Par. 1.)

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\* Extradition of Penaranda from Bolivia to the United States was not possible, since existing treaties between the United States and Bolivia expressly exclude extradition of each country's own citizens. In addition, narcotics offenses are not included in the list of extraditable offenses.

Informed of the outcome of Mr. Brewin's meeting with Interior Minister Castro, Bedolla testified that he obtained the necessary documents and delivered them to Mr. Brewin. (Tr. 18-20) On March 28, 1974, Mr. Brewin delivered the indictment and warrant to Juan Pereda Asbun, the new Minister of Interior of Bolivia. (Brewin Affidavit, Par. 2)

On May 7, 1974 Interior Minister Asbun advised Mr. Brewin that Penaranda had been arrested and the Bolivian government would turn him over to United States authorities, preferably on May 7 or 8. (Brewin Affidavit, par. 3) Mr. Brewin informed Special Agent Bedolla, who testified he immediately made airline reservations for three persons under his name for departure on May 9, 1974. (Tr. 21-22) Special Agent Bedolla testified that he also was told by Mr. Brewin that the Minister of Interior did not want publicity concerning Penaranda's departure. (Tr. 24)

Special Agent Bedolla testified that on May 9, with Special Agent Eugene Castillo, he drove to a small town near the La Paz airport where they met Carlos Valda, the Bolivian official who, Special Agent Bedolla was informed, was assigned by the Minister of Interior to accompany Penaranda to the United States. The three then drove to an area some distance away, where Carlos Valda removed Penaranda from a waiting vehicle and placed him in Special Agent Bedolla's vehicle. Special Agent Bedolla testified he drove Penaranda to the airport, placed him aboard a Braniff plane, and had him flown to New York in the company of Carlos Valda and Special Agent Castillo. (Tr. 26-28)

At the conclusion of the hearing, Judge Stewart denied Penaranda's motion without opinion.



## A R G U M E N T

**The trial court properly refused to divest itself of jurisdiction over Penaranda.**

Penaranda contends that Judge Stewart erred in not finding *Toscanino* applicable to the facts and circumstances by which he was arrested, mistreated, and turned over by the Bolivian government to the United States government for prosecution on Indictment 73 Cr. 751. Judge Stewart's decision refusing to grant Penaranda the relief contemplated by the *Toscanino* opinion, on the facts established below, finds full support in this Court's two subsequent opinions in *United States v. Lira*, Dkt. No. 74-2567 (2d Cir., April 14, 1975) Slip op. 2871 and *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975).

In the first instance, Penaranda appears to claim that his arrest, confinement and delivery by the Bolivian Government to the United States Government itself was illegal and merits the relief he seeks. Relief for that claimed illegality is clearly foreclosed to him, because, at most, the alleged violations were of Bolivian law and occurred at the hands and with the full knowledge of the Bolivian Government. *Lira*, slip op. at 2875-77; *Jujan*, 510 F.2d at 65-66; *Toscanino*, *supra*, 500 F.2d at 267; *United States v. Sobell*, 244 F.2d 520, 524-25 (2d Cir.), *cert. denied*, 355 U.S. 873 (1957).\*

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\* In fact, since Penaranda's arrest, detention and ultimate delivery to United States authorities was carried out by Bolivian agents operating at the direction of the Bolivian Minister of Interior, the propriety of those actions are "acts of state", not generally reviewable in United States Courts. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Ricand v. American Metal Co.*, 246 U.S. 304 (1918); *Underhill v. Hernandez*, 168 U.S. 250 (1897).

Moreover, the claimed illegality in the method employed to obtain jurisdiction over Penaranda falls far short of that alleged in *Lujan*. The Government here did not circumvent the Bolivian Government to obtain jurisdiction over Penaranda. Rather, unable to invoke the authority of the existing extradition treaty between Bolivia and the United States, the Government directly sought the aid of the Bolivian Government to turn over Penaranda to Drug Enforcement Administration agents for prosecution in the United States, which it did on May 9, 1974. In contrast, the facts assumed in *Lujan* were that the United States Government apprehended Lujan, an Argentine citizen, by hiring an Argentine bush pilot to lure him from Argentina to Bolivia, where Lujan was taken into custody and held incommunicado by Bolivian police, acting solely at the direction of the United States Government. Foregoing any attempt to enlist the aid of the Bolivian Government, the United States Government, abetted by freebooting Bolivian policemen,\* flew Lujan out of Bolivia to New York and arrested him here.

Penaranda seeks refuge in the language of *Toscanino*, reiterated in *Lira*, which suggests that where the United States is "substantially involved" in the misconduct, and the foreign police have acted as agents for the United States Government and not merely on behalf of their own government, it will be held responsible for any illegal arrest accompanied by mistreatment by the foreign government. There is no credible evidence to support that claim.

Accepting Penaranda's testimony below as true, it cannot sustain a claim that agents of the United States were in any way involved in his arrest or in his subsequent con-

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\* Unlike the situation in *Lujan*, the evidence below established that the Bolivian agents who arrested and confined Penaranda, and turned him over to United States agents, were acting at the direction of the Bolivian Government, not the United States Government.

finement pending his flight to the United States, nor does it suggest that United States agents were involved in mistreating Penaranda or that they approved or even knew of the methods employed by the Bolivian authorities.\* The testimony of Special Agent Bedolla established that United States participation was limited to activities necessary to arrange transportation for Penaranda out of Bolivia to the United States, after the United States Embassy had received an affirmative decision by the Bolivian Minister of Interior that Penaranda would be turned over to the United States for prosecution.

Penaranda finally claims that the Government should be held vicariously responsible for his illegal arrest, confinement and mistreatment by the Bolivian Government, because the United States requested his arrest. That precise claim was made by *Lira* and rejected by this Court.

Speaking for this Court, Judge Mansfield observed:

"Although no direct involvement by the Government in Mellafe's (*Lira*'s true name) torture could be proven, appellant nevertheless suggests that the Government was 'vicariously responsible' for his torture, since the DEA requested Mellafe's arrest and expulsion and thus 'placed the matter in motion.' This argument must be rejected. Unlike *Toscanino*, where the defendant was kidnapped from Uruguay in defiance of the laws of that country, here the

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\* Surely the mistreatment alleged by Penaranda pales in comparison to the alleged brutalities inflicted upon *Toscanino* and *Lira*. Moreover, the decision in *Toscanino* explicitly turned on the allegations of torture and sadism specifically known to the United States Attorney's office while in progress and participated in by an agent of the Bureau of Narcotics and Dangerous Drugs; and the decision in *Lira* explicitly turned upon the lack of evidence that any official of the United States Government knew of or in any way participated in the mistreatment of *Lira* by the Chilean police.



Government merely asked the Chilean Government to arrest and expel Mellafe in accord with its own procedures. This action can hardly be faulted. Agencies such as the DEA presumably must cooperate with many foreign governments in seeking transfer to the United States of violators of United States law. The DEA can hardly be expected to monitor the conduct of representatives of each foreign government to assure that a request for extradition or expulsion is carried out in accordance with American constitutional standards. Slip op. at 2876.

### CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

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